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75-1419

Supreme Court, U. S.

FILED

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MICHAEL ROYER, JR. CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

Court of Appeals No. 75 1968

District Court Cr. No. 4 81731

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DENNIS McDONALD a/k/a
DENNIS MACDONALD,
Defendant-Appellant,

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE
SIXTH CIRCUIT**

SHELDON HALPERN

Attorney for Defendant-Appellant
1455 Centre Street
Detroit, Michigan 48226
962-7210

KENNETH M. MOGILL

Of Counsel for: Defendant-Appellant
1455 Centre Street
Detroit, Michigan 48226
962-7210

TABLE OF CONTENTS

	Page(s)
Index of Authorities	ii
Opinions	2
Jurisdiction	2
Question Presented	3
Statement of the Case	3
Reasons for Granting the Writ	
I. Notice of Appeal Was Timely Filed	6
II. Second Notice of Appeal Was Filed with Permissible Extension Period	8
Conclusion	10
Appendix A	11
Appendix B	13
Appendix C	15
Appendix D	19
Appendix E	22
Appendix F	24
Appendix G	25

INDEX OF AUTHORITIES

Cases	Page
Alley v. Dodge Hotel, 501 F2d 880 (D.C. Circuit) 1974)	6, 7, 8, 9
Brewen v. United States, 375 F2d 285 (Fifth Circuit 1967)	7
C-Thru Products, Inc. v. Tiniflex, Inc., 397 F2d 952 (Second Circuit 1968)	6
Fall v. United States, 378 U.S. 139, 142 (1964) ...	7, 8
Kurdziel v. Pillsburgh Tube Co., 416 F2d 882 (Sixth Circuit 1969)	6
Miller v. United States, 117 F2d 256 (Seventh Circuit)	6
United States v. Johnson, 405 F2d 1072 (D.C. Cir. 1968)	9
United States v. June, 503 F2d 442 (Eighth Circuit 1974)	6
United States v. Mathews, 462 F2d 182 (Third Circuit 1972)	6
United States v. Mills, 430 F2d 526 (Eighth Circuit 1970)	7, 9
United States v. Robinson, 361 U.S. 220, 224 (1960)	6
United States v. Temple, 372 F2d 795 (Fourth Circuit 1966)	6
United States v. Williams, 508 F2d 411 (Eighth Circuit 1974)	9

IN THE Supreme Court of the United States

OCTOBER TERM, 1975

Court of Appeals No. 75 1968

District Court Cr. No. 4 81731

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DENNIS McDONALD a/k/a

DENNIS MACDONALD,

Defendant-Appellant,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, by and through his attorney, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Sixth Circuit.

1. OPINIONS BELOW

The Opinion of the United States Court of Appeals, Sixth Circuit, entered December 9, 1975, and judgment in accordance with that opinion, hereinafter set forth (Appendix A, *infra* pp. 11-13), is not yet officially reported.

Petition for rehearing was denied by the United States Court of Appeals, Sixth Circuit on March 9, 1976, and judgment in accordance with that opinion, hereinafter set forth (Appendix B, *infra* pp 13-14), is not yet officially reported.

Motion for extension of time *nunc pro tunc* and evidentiary hearing concerning filing of Notice of Appeal was denied by the United States District Court for the Eastern District of Michigan on March 18, 1976, and judgment in accordance with that opinion, hereinafter set forth (Appendix C, *infra*, pp 15-18) is not yet officially reported.

2. JURISDICTION

The Judgment of the United States Court of Appeals, Sixth Circuit, was entered on December 9, 1975 and petition for rehearing denied on March 9, 1976. The jurisdiction of the Court is invoked under Title 28 USC §1254 (1).

3. QUESTION PRESENTED

The question presented by this petition is:

Whether an appeal from a criminal trial in the United States District Court should be dismissed by the United States Court of Appeals for lack of jurisdiction where all parties to the trial (United States Attorney and Co-Defendant), received signed, dated copies of Defendant's Notice of Appeal within the ten (10) day time period under Rule 4b, Fed. R. App Proc., except the United States District Court, who through no apparent fault of the Defendant, failed to record receipt of said notice and who received an unsigned, undated Notice of Appeal within the thirty (30) day extension time in which to file, pursuant to Rule 4, Fed R. App. Proc., but who further refused to grant said extension *nunc pro tunc*?

4. STATEMENT OF THE CASE

On January 16, 1975, Petitioner, Dennis McDonald a/k/a Dennis Macdonald, was sentenced as a result of a conviction in the United States District Court for the Eastern District of Michigan.

On January 22, 1975, a Notice of Appeal was timely filed in this cause when Emily Dawson, secretary to Sheldon Halpern, typed a Notice of Appeal, which was then signed by attorney, Sheldon Halpern, and thereafter mailed by Ms. Dawson to wit:

Clerk of the Court
United States District Court
Room 113, Federal Building
Detroit, Michigan 48226

with copies to:

Ralph B. Guy
United States Attorney
Off. of the United States Attorney General
817 Federal Building
Detroit, Michigan 48226

and to:

Dennis G. Vatsis, Esq.
(Attorney for Defendant Stewart)
1880 Penobscot Building
Detroit, Michigan 48226

(See copy of Affidavit of Ms. Emily Dawson, Appendix D, *infra* pp. 19-21).

At 2:21 P.M. on January 24, 1975, a copy of Petitioner McDonald's Notice of Appeal was received at the office of Ralph B. Guy, United States Attorney (See xerox copy of Notice of Appeal received by United States Attorney, Appendix E, *infra*, pp. 22-24).

On or about the same day, a copy of Petitioner McDonald's Notice of Appeal was received at the offices of Dennis Vatsis, attorney for Defendant Stewart, (See Affidavit of Dennis Vatsis, Appendix F, *infra* p. 24).

On February 5, 1975, secretary Emily Dawson received a telephone call from Steven Greenlee, Deputy Federal Court Clerk; she was told that Notice of Appeal did not appear in the Court file and he directed her to send a copy of the Notice directly to him. Pursuant to the specific instructions of Deputy Clerk Greenlee, Ms. Dawson mailed a copy of the Notice of Appeal directly to him and in a cover letter sent with the notice, Ms. Dawson asked Mr. Greenlee to contact her if there were any further ques-

tions concerning the filing of the Notice. This office received no further response from the Clerk concerning this matter and assumed the notice was properly received (See Affidavit of Ms. Dawson, Appendix D, *infra* pp. 19-21).

On July 28, 1975, Petitioner for the first time, received notice from Assistant United States Attorney Andreoff that Notice of Appeal did not appear in the Court file and investigation into the matter was immediately begun. Another copy of the original Notice of Appeal was then filed and accepted by the District Court.

In a telephone conversation with Bonnie E. McFadden on February 3, 1976, Steven Greenlee acknowledged receiving Ms. Dawson's letter of February 5, 1975 with a copy of the Notice of Appeal enclosed within forty (40) days of sentencing. (See Affidavit of Bonnie E. McFadden, Appendix G, *infra* p. 25).

Appellant's Brief on Appeal, Appellee's Brief on Appeal and Appellant's Brief in Response were filed and accepted by the Clerk for the United States Court of Appeals, Sixth Circuit.

On December 9, 1975, an Order was entered by the United States Court of Appeals, Sixth Circuit, dismissing the Appeal for want of jurisdiction on the grounds that the claim of appeal had not been properly filed and no motion for an extension of time in which to file had been made pursuant to Rule 4, Fed. R. App Proc. On March 9, 1976, the United States Court of Appeals, Sixth Circuit, denied a petition for rehearing.

On March 18, 1976, the United States District Court for the Eastern District of Michigan per Judge Philip Pratt, denied a Motion for an extension of time in which to file Notice of Appeal *nunc pro tunc* for lack of jurisdiction to decide the issue.

5. REASONS FOR GRANTING THE WRIT

I. Notice of Appeal was Timely Filed:

This case raises an important issue of federal Appellate procedure which has a profound effect on Petitioner's Appeal.

Rule 4, Fed. R. App. Proc. requires a criminal Defendant to file a Notice of Appeal within ten (10) days of sentencing and permits the trial court to extend this period for thirty (30) days, thus giving the Defendant forty (40) days in which to file. It is clear that timeliness in noticing appeals is mandatory and jurisdictional and that compliance with applicable requirements is of the utmost importance. *Alley v. Dodge Hotel*, 501 F2d 880 (D.C. Circuit 1974); see *United States v. Robinson*, 361 U.S. 220, 224, (1960); Advisory Committee Note to Fed. R. App. Proc. 3. The purpose of this rule is to give notice to all the parties concerned with the intended appeal and to expedite appeals while guarding against dilatory tactics. *Kurdziel v. Pillsburgh Tube Co.*, 416 F2d 882 (Sixth Circuit 1969); *C-Thru Products, Inc., v. Tiniflex, Inc.*, 397 F2d 952 (Second Circuit 1968); *Miller v. United States*, 117 F2d 256 (Seventh Circuit), *cert. denied*, 313 U.S. 891 (1941).

In applying Rule 4b, several courts have taken a very rigid and ritualistic attitude in denying leave to appeal where there has not been strict compliance with the Rule. *United States v. June*, 503 F2d 442 (Eighth Circuit 1974); *United States v. Mathews*, 462 F2d 182 (Third Circuit 1972); *United States v. Temple*, 372 F2d 795 (Fourth Circuit 1966). However, the better approach, as proposed by the Advisory Committee on Amendments to Rules, this

and other courts is to be more flexible, and tolerate a common sense approach to timely filing. Advisory Committee Note to Fed. R. App. Proc. 3; *Fall v. United States*, 378 U.S. 139, 142 (1964); *Alley v. Dodge Hotel*, 501 F2d 880 (D.C. Circuit 1974); *United States v. Mills*, 430 F2d 526 (Eighth Circuit 1970); *Brewen v. United States*, 375 F2d 285 (Fifth Circuit 1967).

Petitioner contends that he made a timely filing of his Notice of Appeal on January 22, 1975 with a mailing of this notice to the District Court, United States Attorney's Office and Co-Defendant (See Affidavit, Appendix D, *infra* pp. 19-21). Although the District Court has no record of receiving said notice it was received by the other two parties. Pursuant to a phone call from the court's clerk on February 5, 1975, Petitioner sent the court a copy of said Notice of Appeal after the ten (10) day period but within the thirty (30) day extension period permissible under Rule 4b. Petitioner's appeal on the merits of this case was dismissed for lack of jurisdiction due to failure to file timely notice of appeal.

In a very similar case to the one at hand, *Fall v. United States*, *supra*; where the Defendant gave a letter containing his Notice of Appeal to the jail authorities to mail for him but was not informed that mail was picked up only twice a week, this court ruled that since "Petitioner did all he could under the circumstances, we decline to read the Rules so rigidly as to bar determination of his appeal on the merits" where the notice of appeal was received beyond the time limit. *Fall v. United States*, *supra* at 144.

As in *Fall*, Petitioner has done everything within his power to perfect his appeal in strict compliance with the Federal Rules of Appellate Procedure but like *Fall*, through some unfortunate mishap in the postal service

or the District Court Clerk's Office his timely Notice of Appeal was lost. Furthermore, as in *Fall*, the Government has introduced no evidence to contradict Petitioner's Affidavits "that Petitioner had done all that could reasonably be expected to get the Notice of Appeal to its destination within the required ten (10) days." *Fall v. United States*, *supra* at 144.

Consistent with *Fall*, Petitioner urges this Court to find that a "positive, substantial and unequivocal effort to discharge" the notice requirements constitutes sufficient notice to give the Court of Appeals jurisdiction over Petitioner's appeal and "that innocuous irregularities incidental to such an endeavor should be disregarded when considerations of fairness dictate that course." *Alley v. Dodge Hotel*, *supra* at 884.

II. Second Notice of Appeal was Filed with Permissible Extension Period:

Petitioner further asserts that his second Notice of Appeal filed with the District Court on February 5, 1975, was sufficient to give him jurisdiction to appeal his cause. On March 18, 1976, the District Court refused to grant a *nunc pro tunc* extension of time which if granted would have placed Petitioner's February 5, 1975 notice well within the thirty (30) day extension permitted by the Rule. The District Court denied the extension of time *nunc pro tunc* because it felt it was without jurisdiction to grant such an Order and because as it stated, it could not rule on these issues in light of the Court of Appeal decisions denying Petitioner's Appeal for lack of jurisdiction for failure to file timely notice of appeal and its denial of the Petitioner's request for rehearing. District Court also re-

fused to grant an evidentiary hearing concerning the filing of the Notice of Appeal for the same reasons.

Those circuits confronting the issue of *nunc pro tunc* extensions have granted *nunc pro tunc* orders extending the period of timely filing where Defendants failed to file within the ten (10) day period but did so within the thirty (30) day extension period. *United States v. Williams*, 508 F2d 411 (Eighth Circuit 1974); *Alley v. Dodge Hotel*, 501 F2d 880 (D.C. Circuit 1974); *United States v. Mills*, 430 F2d 526 (Eighth Circuit 1970). Although these cases arose in the context of Defendants' attempts to pursue appeal in *per se*, it appears that the courts based their decisions granting such an extension upon a showing of excusable neglect. Petitioner in the instant case has been deprived of the opportunity of an evidentiary hearing to show excusable neglect when it readily exists. *United States v. Johnson*, 405 F2d 1072 (P.C. Cir. 1968). Petitioner filed no motion for an extension in the instant case because he relied on the acceptance of the second notice by the Deputy Clerk and was never informed by said Clerk that said notice mailed on February 5, 1975, at the clerk's request was defective. Furthermore, all briefs on appeal were accepted and transcripts provided without remark to the Notice of Appeal.

The record clearly indicates that the United States Attorney was in no way prejudiced by the District Court's failure to receive Notice of Appeal within the ten (10) day period or by the Court's receipt of notice on February 5, 1975, in that both parties exchanged briefs on appeal and were awaiting the Court of Appeal decision on the issues presented in those briefs; none of which was Petitioner's failure to file timely notice.

The failure of the United States Court of Appeals, Sixth Circuit to grant Petitioner his right to appeal for failure to file a timely Notice of Appeal constitutes a grave injustice to the Petitioner and prevents him from pursuing his appellate remedies on legitimate issues of law. Petitioner asserts that his filing of January 22, 1975, was timely and therefore established appellate jurisdiction in the Court of Appeals. Petitioner further urges this Court to order a *nunc pro tunc* extension of thirty (30) days thereby bringing his filing of February 5, 1975 within the extended time period and giving the Court of Appeals jurisdiction to hear his appeal on the merits. Finally, Petitioner urges that in the alternative, this Court order the District Court to hold an evidentiary hearing on the question of excusable neglect.

6. CONCLUSION

For the reasons stated above, Petitioner prays that this Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

/s/ SHELDON HALPERN
Attorney for Defendant-Appellant
 1455 Centre Street
 Detroit, Michigan 48226
 962-7210

KENNETH M. MOGILL
Of Counsel For:
Defendant-Appellant
 1455 Centre Street
 Detroit, Michigan 48226
 962-7210

APPENDIX A

Office of the Clerk
 United States Court of Appeals
 For the Sixth Circuit
 Cincinnati, Ohio 45202

December 9, 1975.

Mr. Sheldon Halpern
 Mr. Ralph B. Guy, Jr.

Re: U.S.A. vs. Dennis McDonald, etc.
 Our No. 75-1968
 Dist. Ct. Cr. No. 4-81731

Enclosed is a copy of a dismissal order which was entered today in the above-styled case.

Yours very truly,

John P. Hehman, Clerk
 By: /s/ Darlene Koenig
 Deputy Clerk

Enclosure

ORDER

No. 75-1968

(U. S. Court of Appeals—Sixth Circuit)

(Filed December 9, 1975)

United States of America,,	}
Plaintiff-Appellee,	
v.	
Dennis McDonald, a/k/a	
Dennis MacDonald	}
Defendant-Appellant.	

Before: Phillips, Chief Judge; Peck and Lively, Circuit Judges.

Appellant's motion for appointment of counsel on appeal has been assigned to a panel of the court pursuant to Rule 3(e), Rules of the Sixth Circuit.

The record discloses that the judgment of conviction was entered in the district court on January 16, 1975, and no motion in arrest of judgment or motion for a new trial was made by appellant. A notice of appeal was filed on July 28, 1975 and was obviously out of time. Rule 4(a), Fed. R. App. P.

Documents in the record indicate that appellant's trial counsel claimed to have mailed a notice of appeal to the clerk of the district court six days after entry of judgment. No motion was made under Rule 4, Fed. R. App. P. for an extension of time within which to file a motion of appeal.

In the absence of a timely filed notice of appeal this court is without jurisdiction to proceed in the cause, and the appeal must be dismissed.

Appeal dismissed. Rule 8, Rules of the Sixth Circuit.

Entered by Order of the Court

/s/ John P. Hehman,
Clerk.

APPENDIX B

Office of the Clerk

United States Court of Appeals
For the Sixth Circuit
Cincinnati, Ohio 45202

March 9, 1976

Mr. Sheldon Halpern

Mr. Ralph B. Guy, Jr.

Re: Case No. 75-1968

U. S. v. McDonald

Gentlemen:

Enclosed please find a copy of an order which was entered today in the above-styled case.

Very truly yours,

John P. Hehman, Clerk

By: /s/ Darlene Koenig
Deputy Clerk

Enclosure

ORDER

No. 75-1968

(U. S. Court of Appeals—Sixth Circuit)

(Filed March 9, 1976)

Before: Phillips, Chief Judge; Peck and Lively Circuit Judges.

Upon consideration of the petition for rehearing filed herein, the court concludes that the issues raised in the petition were considered at the time of the submission and decision of this appeal.

Wherefore the petition for rehearing and the request for oral argument thereon are hereby denied.

Entered by Order of the Court

/s/ John P. Hehman,
Clerk.

APPENDIX C

**MEMORANDUM OPINION AND ORDER DENYING
MOTION FOR EXTENSION OF TIME IN WHICH
TO FILE NOTICE OF APPEAL AND FOR EVIDENTIARY HEARING CONCERNING
FILING NOTICE OF APPEAL**

(U. S. District Court—Eastern District of Michigan—
Southern Division)

(Filed March 18, 1976)

United States of America,	}	Court of Appeals No. 75-1968
Plaintiff-Appellee,		
vs.		
Dennis McDonald	}	District Court Cr. No. 4-81731
a/k/a Dennis MacDonald		
and Richard Dix Stewart,		
Defendants-Appellants.		

In this case, defendant McDonald, on February 18, 1976, filed a Motion for Extension of Time in which to file Notice of Appeal and for an Evidentiary Hearing Concerning Filing Notice of Appeal.

A brief chronology of the matter, as disclosed by the records and files available to the Court (the original file is retained in the Court of Appeals for the Sixth Circuit in Cincinnati), and insofar as pertinent follows:

Defendant McDonald was sentenced on January 16, 1975. It is claimed that a Notice of Appeal was sent to the Clerk's Office on January 22, 1975. However, no entry appears on the Clerk's records, nor does such Notice appear in the file. On July 28, 1975, a Notice of Appeal was filed in the Clerk's Office. On December 9, 1975, the Court of

Appeals for the Sixth Circuit entered its Order dismissing the appeal on the grounds that it lacked jurisdiction due to the failure to file a timely notice of appeal. On February 25, 1976, defendant mailed to the Clerk of the Court of Appeals a Petition for Re-Hearing and to Vacate Order of Dismissal. The supporting documents attached thereto include a copy of the instant Motion. On March 9, 1976, the Court of Appeals for the Sixth Circuit denied the Petition for Re-Hearing.

This Court does not consider that it has jurisdiction to entertain the Motion and must, therefore, decline to do so.

Rule 4, Federal Rules of Appellate Procedure, provides that a notice of appeal must be filed within ten (10) days after the entry of judgment. It is also provided that:

"Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of time otherwise prescribed by this subdivision."

It is obvious that this Court cannot extend the time beyond 40 days from the entry of the final judgment *U.S. v. June*, 503 F.2d 442, 443 (8th Cir. 1974). That is also the position inherent in the Court of Appeals Order of December 9, 1975, in this case.

Of equal importance, however, is that the Sixth Circuit in its December order alluded to its consideration of the claim of counsel that a notice of appeal was mailed within six days after the entry of judgment. It then went on to state that:

"In the absence of a timely filed notice of appeal this court is without jurisdiction . . ."

The only conclusion this Court can draw from that language is that the Sixth Circuit found, despite counsel's claim, that a timely appeal was *not* filed. This conclusion is reinforced by its subsequent order of March 9, 1976, in which the Sixth Circuit states that it considered the Petition for Re-Hearing, which, it is emphasized, not only contains the identical allegations found in the instant motion, but also had attached to it a copy of the instant motion.

The effect of all this is to request this Court to review the findings of the Sixth Circuit and, contrary to its explicit determination, find that a notice of appeal *was* timely filed.

It must be noted that the Court of Appeals, upon being confronted with the claims of counsel, could have accepted them or remanded the matter for an evidentiary hearing by this Court or rejected them. It chose the latter course. Thus, for this Court to conduct an evidentiary hearing would be an exercise in futility, aside from being presumptuous and probably without jurisdictional basis.

It is the conclusion of this Court, then, that it lacks jurisdiction to extend the time to file a notice of appeal and that the issue as to whether a timely notice of appeal was filed has heretofore been decided by the Court of Appeals for the Sixth Circuit and is, therefore, moot.

The Motion is, therefore, Denied.

It Is So Ordered.

/s/ Philip Pratt

United States District Judge.

Dated: March 18, 1976, at Detroit, Michigan.

Proof of Mailing

(U. S. District Court—Eastern District of Michigan—
Southern Division)

United States of America
Eastern District of Michigan—ss.

Helen M. Ogger, being first duly sworn, deposes and says that she is the Secretary of the Honorable Philip Pratt, United States District Judge for the Eastern District of Michigan, and while acting in such capacity did send a copy of the MEMORANDUM OPINION & ORDER DENYING MOTION FOR EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL AND FOR EVIDENTIARY HEARING CONCERNING FILING NOTICE OF APPEAL; and PROOF OF MAILING by enclosing the same in an envelope, with first class postage fully prepaid and depositing same in a United States Postal Service receptacle on the undersigned date, to the following persons:

Christopher Andreoff, Asst. U. S. Atty., 817 Federal Bldg.,
Detroit, MI 48226

Sheldon Halpern, Esq., 1455 Centre Street, Detroit, Mich.
48226

/s/ Helen M. Ogger
Secretary

Dated: March 18, 1976.

Subscribed and sworn to before me this 18th day of March,
1976.

/s/ Roy Luxton
Notary Public, Oakland County, Michigan
(Acting in Wayne County)
My Commission expires November 6, 1979.

APPENDIX D**AFFIDAVIT**

(U. S. Court of Appeals—Sixth Circuit)

United States of America,	}	Federal District Court
Plaintiff-Appellee,		No. 4 81731
v		Court of Appeals
Dennis McDonald		No. 75 1968
a/k/a Dennis MacDonald,	}	
Defendant-Appellant.		

State of Michigan,
County of Wayne—ss.

Emily Tynes Dawson, being first duly sworn, does depose and state as follows:

That during the period January to June, 1975, she was employed as secretary to Sheldon Halpern;

That on January 22, 1975, in the course of her duties as secretary, she had occasion to type and prepare a document entitled "Notice of Appeal" in connection with the case of *United States v. Dennis McDonald*, U. S. District Court No. 74-81731.

That, on that same date, she mailed an original typed copy of said "Notice of Appeal" to the Clerk of the Court, Federal District Court, 133 Federal Building, Detroit, Michigan 48226, and to Ralph B. Guy, United States Attorney, Appellate Division, 817 Federal Building, Detroit, Michigan 48226 and to Dennis Vatsis, Esq., attorney for co-defendant Stewart, at 1880 Penobscot Building, Detroit, Michigan 48226.

That, on January 22, 1975, she executed a Proof of Service of copies of the "Notice of Appeal" upon Mr. Guy and Mr. Vatsis, which she mailed to the Federal Court Clerk along with the original copy of the "Notice of Appeal".

That several days after these documents were mailed, she received a telephone call from Mr. Steven Greenlee, clerk to the Honorable Philip Pratt. Mr. Greenlee stated that Assistant United States Attorney Christopher Andreoff had received a copy of the "Notice of Appeal", but that the Court file did not contain a copy. Ms. Dawson replied that she had mailed the notice to the Court on January 22, 1975. Mr. Greenlee then told her to mail a copy of the notice directly to him.

That, pursuant to this telephone call she mailed a copy of the "Notice of Appeal" to Mr. Steven Greenlee, with a covering letter noting service upon Mr. Guy and Mr. Vatsis, and requesting that Mr. Greenlee contact the office if there were any further questions. (Letter attached).

That, no further communication was received from Mr. Greenlee concerning the Notice of Appeal; that Ms. Dawson had occasion to speak with Mr. Greenlee on several occasions thereafter in connection with this case, and nothing was said by him to indicate that the "Notice of Appeal" had not been received by him or that it was not in proper order.

Further Deponent Says Not.

/s/ Emily Tynes Dawson

Subscribed and sworn to before me this 2nd day of January, 1976.

/s/ Bonnie E. McFadden
Notary Public, Wayne County, Michigan
My Commission Expires: July 6, 1977.

February 5, 1975

Mr. Steven Greenlee
Clerk, U. S. District Court
277 Federal Building
Detroit, Michigan 48226

Re: *U. S. v. Dennis McDonald*
No. 4 81731

Dear Mr. Greenlee:

As per our telephone conversation of 2/5/75 in which you stated that you had not received a copy of the above referenced Notice of Appeal, please find enclosed a true copy of that document which was mailed to Federal Court on January 22, 1975. Copies were also served on Ralph B. Guy and Dennis G. Vastis, Esq.

If you should have any further questions regarding this matter, kindly contact this office.

Sincerely,

Emily T. Dawson
Sec'y to Mr. Halpern

enc.

APPENDIX E

NOTICE OF APPEAL

(U. S. District Court—Eastern District of Michigan—
Southern Division)

United States of America,	}	No. 4 81731
Plaintiff,		
v		
Dennis McDonald,		
a/k/a Dennis MacDonald,		
and Richard Dix Stewart.		

Notice is hereby given that Dennis McDonald, a/k/a Dennis MacDonald, defendant herein, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the judgment of conviction rendered by jury verdict on October 31, 1974 and sentence entered on January 16, 1975.

Dated: January 22, 1975.

RECEIVED
Jan. 24 2:21 P.M. '75
Eastern District of Michigan
United States Attorney
"Np"—Marge Prybys

/s/ Sheldon Halpern
Attorney for Defendant
McDonald
1455 Centre Street
Detroit, Michigan 48226
Telephone: 962-7210

Proof of Service

(U. S. District Court—Eastern District of Michigan—
Southern Division)

State of Michigan
County of Wayne—ss.

Emily T. Dawson, being first duly sworn, deposes and says on January 22, 1975, she mailed a NOTICE OF APPEAL to the following:

RALPH B. GUY
Assistant U. S. Attorney
Office of the United States Attorney General
Appellate Division
817 Federal Building
Detroit, Michigan 48226

DENNIS G. VATSIS, ESQ.
1880 Penobscot Bldg.
Detroit, Michigan 48226

/s/ Emily Dawson

Subscribed and sworn to before me this 22nd day of January, 1975.

/s/ Sheldon W. Halpern
Notary Public, Wayne County, Michigan
My Commission expires: 4/26/75.

APPENDIX F

AFFIDAVIT OF DENNIS G. VATSIS

(U. S. Court of Appeals—Sixth Circuit)

United States of America,	}	Court of Appeals
Plaintiff-Appellee,		No. 75 1968
v		
Dennis McDonald,	}	District Court
a/k/a Dennis MacDonald,		Cr. No. 4 81731
Defendant-Appellant.		

State of Michigan
County of Wayne—ss.

DENNIS G. VATSIS, being first duly sworn, deposes and says that he was the attorney on appeal for Richard Dix Stewart, Co-Defendant in the above-captioned cause and that to the best of his recollection, on or about January 24, 1975, he received a copy of Defendant McDonald's Notice of Appeal and thereafter retained a copy of said Notice in his case file.

Further deponent sayeth not.

/s/ Dennis G. Vatsis

Subscribe and sworn to before me this 16th day of February, 1976.

/s/ Cecilia Torres,
Notary Public, Wayne County, Michigan
My Commission Expires: 3/5/78.

APPENDIX G

AFFIDAVIT

(State of Michigan—Court of Appeals)

State of Michigan
County of Wayne—ss.

BONNIE E. McFADDEN, being first duly sworn, does depose and state that on February 3, 1976, she had occasion to call Clerk, Steven Greenlee, concerning the filing of a Notice of Appeal in this case and in the course of that conversation, Mr. Greenlee acknowledged speaking with Ms. Dawson on or about February 5, 1975 concerning the Notice of Appeal; he further acknowledged receiving her letter of February 5, 1975 containing a copy of the Notice of Appeal for Dennis McDonald.

Further deponent sayeth not.

/s/ Bonnie E. McFadden
1455 Centre Street
Detroit, Michigan 48226
962-7210

Subscribed and sworn to before me this 24th day of February, 1976.

/s/ Cecilia Torres,
Notary Public, Wayne County, Michigan
My Commission Expires: 3/5/78.

No. 75-1419

Supreme Court, U. S.
FILED

AUG 9 1976

MICHAEL ROBAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

DENNIS McDONALD A/K/A DENNIS MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
ANN T. WALLACE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1419

DENNIS McDONALD A/K/A DENNIS MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on both counts of an indictment charging conspiracy to obstruct and obstruction of commerce by extortion, in violation of 18 U.S.C. 1951. He was sentenced on January 16, 1975, to 15 years' imprisonment on each count, the sentences to run concurrently.

According to affidavits attached to the petition, on January 22, 1975, six days after sentence was imposed, petitioner's counsel mailed a notice of appeal to the district court and mailed copies to the United States Attorney and counsel for the co-defendant (Pet. App. D, pp. 19-20). The latter two persons received the notice on January 24, 1975 (Pet. App. E, p. 22; Pet. App. F, p. 24). The district court, however, apparently did not receive the notice and on February 5, 1975, a deputy clerk informed

petitioner's counsel by telephone that although the United States Attorney had received the notice, the court file did not contain it (Pet. App. E, pp. 20-21). When counsel's secretary told the deputy clerk that the notice had been mailed to the court on January 22, 1975, he "then told her to mail a copy of the notice directly to him" (*id.* at 20). On the same day, she mailed him an unsigned and undated copy of the notice, which the deputy clerk received (Pet. App. D, pp. 20-21; Pet. App. G, p. 25).

On July 28, 1975, 193 days after sentencing, petitioner's counsel filed a signed and dated notice of appeal in the district court (see Pet. App. A, p. 12; Pet. App. C, p. 15).

Both petitioner and the government filed extensive briefs in the court of appeals. On December 9, 1975, however, the court of appeals dismissed the appeal as untimely (Pet. App. A), and on March 9, 1976, denied rehearing (Pet. App. B, p. 14).

In the interim, petitioner filed a motion in the district court for an extension of time for filing his notice of appeal. Specifically, petitioner sought an extension of time *nunc pro tunc* to the day the district court received the unsigned and undated copy of the notice of appeal which petitioner's counsel had mailed on February 5, 1975. The district court denied the motion (Pet. App. C, pp. 15-17). The clerk's office for the Eastern District of Michigan informs us that petitioner has not appealed from the denial of this motion.

DISCUSSION

This is a troublesome case. Petitioner stands convicted of two serious felonies for which he has been sentenced to 15 years' imprisonment. Petitioner's counsel endeavored to file a timely appeal by mail, but the notice apparently never reached the district court, although the United States Attorney received a copy. Both sides filed briefs

on the merits in the court of appeals.¹ The court dismissed the appeal as untimely, however, because the only notice of appeal appearing in the record was not filed until 193 days after sentencing. The court acted on its own motion; the government did not suggest that the appeal was untimely.²

1. The literal language of Rule 4(b) of the Federal Rules of Appellate Procedure supports the action of the court of appeals. It provides:

In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. * * * Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

Petitioner did not comply with these requirements. He did not file in the district court a notice of appeal within ten days after the entry of judgment. The mere mailing of the notice within that period did not constitute a timely filing.³ The failure to file a timely notice is a jurisdictional

¹We are lodging a copy of the government's brief with the Clerk of this Court.

²At the request of the district judge, the United States Attorney filed a short memorandum in response to petitioner's motion in the district court to extend time; in pertinent part the memorandum points out that under Rule 4(b), Fed. R. App. P., the district court cannot extend the time for filing a notice of appeal more than 40 days after sentencing.

³Since the office of petitioner's counsel and the courthouse are located not only in the same city (Detroit) but in the same zip code area, it would not have been difficult for counsel to have physically filed the notice in the clerk's office.

defect warranting dismissal of the appeal. See *United States v. Robinson*, 361 U.S. 220, 229; *Durham v. United States*, 400 F. 2d 879, 880 (C.A. 10), certiorari denied, 394 U.S. 932; *Buckley v. United States*, 382 F. 2d 611, 614 (C.A. 10), certiorari denied, 390 U.S. 997; *United States v. June*, 503 F. 2d 442, 443 (C.A. 8); *United States v. Mathews*, 462 F. 2d 182, 183 (C.A. 3), certiorari denied, 409 U.S. 896; cf. *United States v. Smith*, 331 U.S. 469, 472-477.

Petitioner did not obtain an extension of time for filing a notice of appeal for an additional 30 days, on the basis of excusable neglect. On February 5, 1975, 20 days after imposition of sentence and 14 days after petitioner's counsel had mailed the notice of appeal to the court, the deputy clerk notified counsel that there was no notice of appeal in the court file. The mailing by counsel in response of an undated and unsigned copy of the notice was insufficient to constitute the timely filing of a notice because (1) the district court did not authorize the belated filing and (2) even if an extension of time for filing is authorized, the defendant still must file a proper notice of appeal, i.e., one signed and dated. The "filing" of an undated and unsigned copy of the notice did not satisfy the requirement in the rule that "a notice of appeal * * * be filed" within the time limits the rule prescribes.⁴

Thus, there was a valid basis in Rule 4(b) for the court of appeals' conclusion that there was no "timely filed notice of appeal" and that the court therefore was "without jurisdiction to proceed in the cause" (Pet. App. A, p. 13).

⁴The district court thus justifiably denied petitioner's motion for an extension of time *nunc pro tunc* to the date the copy of the notice was received by the court clerk, since even if such a motion is proper under the rule, the defective notice need not have been considered sufficient to perfect the appeal.

2. Viewing the issue more broadly, however, the action taken by petitioner's counsel may properly be viewed as constituting substantial compliance with the rule and as satisfying the policy considerations that underlie it.

As petitioner points out (Pet. 6), the principal purposes of the notice requirement and time limitations are to give notice to the other parties of the intention to appeal and to prevent dilatory tactics which might prejudice the appellee or otherwise hinder effective appellate review. In this case, the United States Attorney and petitioner's co-defendant received timely notice of petitioner's intention to appeal. The United States Attorney received a copy of the notice of appeal eight days after sentence was imposed (see Pet. App. B), the same date on which petitioner's co-defendant's counsel received the notice. When petitioner's counsel learned that the court had not received the notice, he promptly endeavored to correct the deficiency by mailing a copy of the notice to the deputy district court clerk, as the latter had requested.

Petitioner was convicted of a serious crime and given a substantial sentence. The case was fully briefed in the court of appeals. The effect of the court of appeals' dismissal of the appeal on its own motion has been to deny petitioner appellate review of his conviction. In the particular circumstances of this case, where petitioner's counsel made good faith but inadequate efforts to perfect the appeal, fairness to the petitioner suggests that a less rigid approach than that the court of appeals took would be in order.

Accordingly, we suggest that it would be appropriate for the Court, in the exercise of its supervisory authority,

to grant the petition, reverse the judgment of the court of appeals dismissing the appeal as untimely, and remand to that court to consider the merits of the appeal.

Respectfully submitted.

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AUGUST 1976.